Supreme Court, U.S.
FILED

06-819 DEC 08 2006

OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

MARSHALL K. FLOWERS and ANNA FLOWERS,
Petitioners,

v.

UNITED STATES ARMY, 25th Infantry Division; FORT JACKSON FEDERAL CREDIT UNION; FIRST HAWAIIAN BANK; UNITED STATES OF AMERICA; THOMAS E. WHITE, Secretary of the Army; JOHN OHLWEILER, Captain,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MARSHALL K. FLOWERS
P.O. BOX 29632
HONOLULU, HI 96820
(808) 256-2279

ANNA FLOWERS
50 ALBERT STREET
GOODWOOD 5034
ADELAIDE, SOUTH AUSTRALIA
61 88 358-5890

RECEIVED
DEC 13 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Petitioners pro se

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

The Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 was enacted by Congress in order to provide protection against unrestricted access to financial records to fill in void left by the Supreme Court holding in *United States v. Miller*, 425 U.S. 435 that a bank customer has no constitutionally protected privacy interest in bank records. The questions presented in this case are:

1. Whether *Feres v. United States*, 340 U.S. 135 bars petitioners' claim under the Right to Financial Privacy Act.

2. Whether the Ninth Circuit's ruling that *Feres* bars petitioners' RFPA claim conflict with decisions of other courts. Namely, the U.S. Court of Appeals for the Armed Forces, the United States Court of Appeals for the Fourth, Fifth, Tenth, and District of Columbia Circuit.

3. Whether *Feres* shields the United States Army from discovery in petitioners' suit against First Hawaiian Bank and Fort Jackson Federal Credit Union for violation of the Act.

4. Whether the court erred in granting the financial institutions summary judgment and awarding cost to Fort Jackson Federal Credit Union.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1 (b), the following identifies all of the parties appearing here and before the United States Court of Appeals for the Ninth Circuit. The petitioners here and appellants below are Marshall K. Flowers and Anna Flowers. The appellees below and respondents are United States of America, United States Army, 25th Infantry Division (L), Thomas E. White in his official capacity as Secretary of the Army and John Ohlweiler in his official capacity as Captain, United States Army (collectively "federal defendants"), First Hawaiian Bank and Fort Jackson Federal Credit Union, Fort Jackson, South Carolina.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioners states that Marshall K. Flowers and Anna Flowers were plaintiffs-appellants below in two cases consolidated below and in the appeals court. Both hold no publicly held company that has a 10% or greater ownership interest.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

RELATED CASE 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT 2

A. Procedural History 3

B. *Flowers v. First Hawaiian Bank* Proceeding Below and Remand of the Ninth Circuit Court 6

C. The District and Appellate Court Decision in the Instant Appeal 7

REASONS FOR GRANTING THE PETITION 11

I. THE JUDICIAL IMPORT OF *FERES V. UNITED STATES*, 340 U.S. 135 CANNOT BAR THE FLOWERS' CLAIM UNDER THE RIGHT TO FINANCIAL PRIVACY ACT,§ 3416 11

A. The Right to Financial Privacy Act, 12 U.S.C, § 3401 et. seq 12

B. The RFPA and Its Application to National Defense- Title 32 Code of Federal Regulation ("CFR") Parts 275 and 504 (1998)-Obtaining Information From Financial Institutions 15

C. The Federal Tort Claims Act ("FTCA") 16

D. The *Feres* Doctrine (*Feres v. United States*, 340 U.S. 135 (1950)) 17

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE §§ 3416, 3417(A) AND 32 C.F.R.§ 504.2 (1998) WAIVES THE GOVERNMENT SOVEREIGN IMMUNITY AND PROVIDE FOR PENALTIES FOR WILLFUL AND INTENTIONAL VIOLATIONS OF THE ACT 19

III. THE NINTH CIRCUIT'S TEST FOR DETERMINING WHAT CONSTITUTES "ACTIVITY INCIDENT TO SERVICE AND ITS HOLDING THAT FERES BARS PETITIONERS RFPA CLAIMS CONFLICTS WITH DECISIONS OF OTHER COURTS CIRCUITS 20

IV. THE DISTRICT COURT'S APPLICATION OF FERES DENIED DISCOVERY AND IMPROPERLY GRANTED SUMMARY JUDGMENT TO THE FINANCIAL INSTITUTIONS 25

CONCLUSION 30

APPENDIX

A. Order-Petition for Rehearing Denied 1a

B. Memorandum of the United States Court of Appeals For the Ninth Circuit, filed May 3, 2006 . . . . . 2a-7a

C. Order Adopting in Part and Modifying In Part Report of the Special Master on Plaintiffs'Motion for Attorney Fees and Non-Table (sic), Filed May 11, 2004 . . . . . 8a-14a

D. Order Denying Plaintiffs Marshall K. Flowers and Anna Flowers' Motion for Reconsideration filed April 13, 2004 . . . . 15a-20a

E. Report of the Special Master on Plaintiffs' Motion for Attorney Fees and Non-Table (sic) Cost filed on March 19, 2004 . . . . . 21a-38a

F. Order Adopting Findings and Recommendations Regarding Defendant Fort Jackson Federal Credit Union's Bill of Cost filed on March 1, 2004 . . . . . 39a- 40a

G. Report of the Special Master on Defendant Fort Jackson Federal Credit Union's Bill Of Cost filed on February 9, 2004 . . . . . 41a- 47a

H. Order Dismissing Cross-Claims and Granting Motion to Extend Deadline To file Notice of Appeal filed on January 26, 2004 . . . . . 48a-52a

I. Order Amending Order of December 5, 2004 and Denying Motion for Reconsideration filed on January 5, 2004 . . . . . 53a-54a

J. Judgment in a Civil Case (CV 01-00412 SPK) filed on December 8, 2003 . . . . . 55a-56a

K. Judgment in a Civil Case (CV 99-00335 SPK) filed on December 8, 2003 . . . . . 57a-58a

L. Order Granting In Part and Denying In Part Motions for Summary Judgment and Ruling On Other Pending Matters filed on December 5, 2003 . . . . . 59a-80a

M. Order Granting Federal Defendants' Motion to Dismiss, and Affirming In Part and Reversing In Part the September 11, 2003 Discovery Order Filed on October 31, 2003 . . . . . 81a-97a

N. The Right to Financial Privacy Act of 1978 (1998) 98a-113a

O. Title 32 C.F.R. Part 275- Obtaining Information From Financial Institutions (1998) 114a-118a

Title 32 C.F.R. Part 504-Obtaining Information from Financial Institutions (1998) . . . . . 118a - 141a

P. Army Regulation 190-6 -Obtaining Information from Financial Institutions (15 January 1992) 142a- 161a

TABLE OF AUTHORITIES

Cases

Adams v. Board of Governors of the Federal Reserve Bd.,
659 F.Supp. 948, 954 (D. Minn. 1987) 13

Anderson v. La Junta State Bank,
115F.3d 756 (10th Cir. 1997) 23

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 106 S.Ct. 2505,
91 L.Ed.2d 202 (1986) 26

Bivens v. Six Unknown Named Agents,
403 U.S. 388 (1971) 18

Brooks v. United States,
337 U.S. 49 (1949) 17, 18

Celotex Corp. v. Catrett,
477 U.S. 317, 106 S.Ct. 2548,
91 L.Ed.2d 265 (1986) 26

Chappel v. Wallace,
462 U.S. 296 (1983) 18

Comm. Nat'l Bank v. Germain,
503 U.S. 249, 112 S.Ct. 1146,
117 L.Ed2d. 391 (1992) 23, 24

Cummings v. Department of the Navy,
279 F.3d 1051 (D.C. 2002) 23, 24, 25

Donovan v. National Bank of Alaska,
696 F.2d 678 (9th Cir. 1983) 13

Dorsey v. Dep't of Labor,
41 F.3d 1551 (D.C. Cir. 1994) 24

Duncan v. Belcher,
813 F.2d 1335 (4th Cir. 1987) 22

Fawn Mining Corp v. Hudson,
80 F.3d 519 (D.C. Cir. 1996) 24, 25

Feres v. United States,
340 U.S. 135 (1950) . . . . . *passim*

Flowers v. First Hawaiian Bank,
85 F. Supp. 2d 993 . . . . . 1, 6

Flowers v. First Hawaiian Bank,
295 F.3d 966 (9th Cir. 2002) 1, 4, 7, 12

Flowers v. First Hawaiian Bank,
289 F. Supp.2d 1213 (D. Hawaii 2003) 1, 8, 28

Hodge v. Dalton,
107 F.3d 705 (9th Cir. 1997) 8

Jackson v.Brigle,
17 F.3d 280 (9th Cir. 1994) 9

Lane v. Pena,
518 U. S. 187 (1996) 12

Lee v. City of Los Angeles,
250 F.3d 668 (9th Cir. 2001) 27

McDonough v. Windall,
891 F. Supp. 1439 (D. Colo.1995) 22

McNiel v. United States,
508 U.S. 106, 113 S.Ct. 1980 (1993) 17

Meridian Intern. Logistics, Inc. v. United States,
939 F.2d 740 (9th Cir. 1991) 17

Parker v. Levy,
417 S.Ct. 2547, 41 L.Ed. 2d 439 (1974) 20

Rivera City of LA,
159 F.3d 470 (9th Cir. 1998) 26

Rubin v. United States,
449 U.S. 424, 101 S.Ct. 698,
66 L.Ed.2d 633 (1981) 24

Securities and Exchange Commissioner v. Jerry T. O'Brien, Inc.,
467 U.S.735, 104 S.Ct.2720,
81 L.Ed2d 615 (1984) 22

Taylor v. Department of the Air Force,
18 F. Supp. 2d. 1184 23

United States v. Dowty,
48 M.J.102 (1998) 14, 20, 21

United States v. Frazin,
780 F.2d 1461 (9th Cir. 1986) 13

United States v. Idaho ex rel. Dep't of Water Resources,
113 S. Ct. 1893 (1993) 17

United States v. Johnson,
481 U.S. 681 (1987) 10, 18

United States v. Miller,
425 U.S. 435, 96 S.Ct. 1619,
48 L.Ed. 2d 71 (1976) 12

United States v. Stanley,
483 U.S.669 (1986) 11

United States v. White Mountain Apache Tribe,
537 U. S. 465 (2003) 12

United States v. Wooten,
M.J. 141 (CMA 1992) 23

Waye v. First Citizens National Bank,
846 F.Supp. 310 (M.D. Pa. 1994) 13

Weiss v. United States,
510 U.S. 163, 114 S.Ct. 752,
127 L. Ed. 2d 1 (1994) 20

Zaputil v. Cowgill,
335 F.3d 885 (9th Cir. 2003) 10

Constitutional and Statutory Provisions

U.S. Const., Art. I, § 8, cl. 14 20

5 U.S.C. § 551(1)(F) 14
28 U.S.C. § 1346(b) 2, 16, 17
28 U.S.C. § 1346(b)(1) 17
28 U.S.C. § 2671 17
28 U.S.C. § 2674 . . . . . 16, 17
28 U.S.C. § 2675 17
28 U.S.C.§§ 2671-2680 . . . . . 2, 16
28 U.S.C. § 2680 (a)-(n) 17

The Right to Financial Privacy Act (1998)

12 U.S.C. §§ 3401-3422 . . . . . 2, 20
§ 3401(3) 13
§ 3402 . . . . . 4, 12, 29
§ 3403(b) 4, 6, 7, 27
§ 3404 12
§ 3405 12
§ 3405(2) 13
§ 3406 12
§ 3407 . . . . . 12, 15
§ 3407(2) 13
§ 3408 12
§ 3408(4) 13
§ 3410 15
§ 3410(a) 13
§ 3413 . . . . . 14, 29
§ 3413(e) 2, 6, 7, 29
§ 3413(i) 7
§ 3416 . . . . . *passim*
§ 3417(a) . . . . . *passim*
§ 3417(a)(3) 13, 23
§ 3417(d) 14, 22

Federal Rules of Civil Procedure

Rule 12(b) 26
Rule 12(b)(6) 27
Rule 56 27
Rule 56(c) 26
Rule 56(f) 10, 26, 28

Title 32 Code of Federal Regulation (1998)

§ 275 15
§ 275.1 . . . . . 15, 24

§ 275.2 (a) 15, 24
§ 504 . . . . . 2, 15, 27
§ 504.1 . . . . . 15, 24, 29
§ 504.2 (e) 4, 27
§504.2 (k) . . . . . *passim*

Miscellaneous

H.Rep. No. 1383, 95th Cong., 2d Sess. 33, reprinted in
1978 U.S. Code Cong. & Admin. News 9305 . . . . 12, 13

Manual for Courts-Martial, United States (1995)
Para. 14c(2)(a)(iii), Part IV 15, 21, 29

Defense Directive 5400.12,
"Obtaining Information from Financial Institutions,"
§ A (Feb 6, 1980) 21

Change 1 to DODD 5400.12, 23 April 1981 16

Uniform Code of Military Justice

Article 15 . . . . . 5, 28
Article 32 . . . . . *passim*
Article 46 15
Army Regulation 190-6 (15 January 1982) . . . . . *passim*
Army Regulation 601-280 6
Para 2-5 . . . . . 4, 5
Para 2-11 14
Para 2-12 . . . . . 6, 19
DA PAM 27-50-131 5

Marshall K. Flowers and Anna Flowers respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit affirmed the lower court's decision in an unpublished memorandum and is reproduced in the appendix and attached hereto (Pet.App. 2a-7a). The district court final judgments are at Pet.App. 55a-56a and 57a-58a. The opinion of the district court are reported at 289 F. Supp. 2d 1213 (D. Hawaii 2003), and 295 F.Supp. 2d 1130 (D. Hawaii 2003) and attached hereto at Pet. App. 81a-97a and Pet. App.59a-80a respectively.

RELATED CASE

The opinion of the lower Court in *Flowers v. First Hawaiian Bank* is reported at 85 F. Supp. 2d 993 and the Ninth Circuit's remand is reported at 295 F.3d 966 (9th Cir. 2002).

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2006. Pet. App. 2a-7a. Petitioners submitted a timely petition for rehearing and rehearing en banc that was denied on September 14, 2006 (Pet. App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the Right to Financial Privacy Act, Pub. L. No.96-630 (1978)(codified at 12 U.S.C, §§ 3401-3422) and pertinent portions are reproduced at Pet. App. 98a-113a, Title 32 Code of Federal Regulations (C.F.R) parts 274 and 504 (Obtaining Information from Financial Institutions)) cited in this petition are reprinted in Pet. App. 114a-141a and provisions of the Federal Tort Clams Act 28 U.S.C. §§ 1346(b), 2671-2680 (h).

STATEMENT

I. Petitioners Marshall K. Flowers ("SGM Flowers or Mr. Flowers") and Anna Flowers (Ms. Flowers) (collectively "the Flowers") sued the U.S. Army, First Hawaiian Bank ("the Bank") and Fort Jackson Federal Credit Union ("the Credit Union") (collectively "financial institutions) for violating their financial privacy under the Right to Financial Privacy Act ("RFPA"), 12 U.S.C.§§ 3401-3422. See also 32 CFR §504. The district court dismissed the Flowers' claims against the federal defendants pursuant to *Feres v. United States*, 340 U.S. 135 (1950) on October 31, 2003. Pet. App. 81a-97a. Thereafter, entered summary judgment and cost for Fort Jackson Federal Credit Union ("Credit Union") against the Flowers holding that 12 U.S.C. § 3413(e)[1] applied. But the court determined the Bank was liable to the Flowers for

---

[1] 12U.S.C. § 3413(e), which provides that "[n]othing in this chapter shall apply when financial records are sought by a Government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules in other courts in connection with litigation to which the Government authority and the customer are parties."

statutory damages of $100 each, one third cost of attorney fees at $13,500.00.82 and cost of $496.30. Pet.App.14a.

A. Procedural History

1. The facts as determined by lower court are disputed except that on December 13, 1997 Army and Air Forces Exchange System (AAFES) personnel detained and questioned SGM Flowers for suspected shoplifting. During detainment, SGM Flowers presented to military police an exchange receipt given him by store greeter Ms. Raymondi Kunasaki for exchange of a "Western hard drive." Additionally, Ms. Kunisaki provided Criminal Investigative Division (CID) agents a sworn statement that affirmed the receipt provided to SGM Flowers and her signature. Ms. Kunisaki's and others' statement obtained were concealed and false information provided in an affidavit to a military judge in Washington State that provided CID persons with a search authorization to search the Flowers' living quarters and confiscate their personal property.[2]

2. Through altering of evidence and improper influenced, on or about April 7, 1998 Captain John Ohlweiler (hereinafter "Maj. Ohlweiler")[3] had Capt. Joseph Hall, HHC 25th ID to prefer charges against SGM Flowers that alleged violation of

---

[2] The Army alleges it has been investigating the Flowers over a period of time for returning items to the Post Exchange without a receipt and on film depicting SGM Flowers stealing from the Naval Exchange and other exchanges in Hawaii.

[3] Capt. John Ohlweiler was a assigned to the 25th Infantry Division Trial Services Office as a member of the Judge Advocate General Corp. Since then he has been promoted to major and will hereinafter be referred to in the present rank.

Article 121(Larceny). Then Maj. Ohlweiler convened an unauthorized Article 32 hearing[4] on June 25-26, 1998 to intimidate and coerce SGM Flowers into retirement. But prior to the hearing, Maj. Ohlweiler telephoned First Hawaiian Bank and Fort Jackson Federal Credit Union where the Flowers maintained accounts and obtained their agreement to produce the Flowers' financial records. Later, which he provided two unauthorized subpoenas; one to the Bank for an unauthorized Article 32 hearing and the other to the Credit Union for a [non-existent] General Court-Martial dated June 19 and June 24, 1998 respectively. [5] The Flowers were not notified that the Army has sought and obtained their financial record. Nor did the Army provide financial institutions with a certificate of compliance. *See* 12 U.S.C.§§ 3402 (4), 3403(b), 3407 *see also* 32 C.F.R. §§ 504.2(e), 504.2(k)(3) (1998) (Pet. App. 100a-101a, 103a, 124-125a, 132a) and Army Regulation (AR) 190-6, para 2-5 (15 January 1982) (a certificate of compliance with the Right to Privacy Act of 1978(App C) will be provided to the financial institution as a prerequisite to obtaining access to financial records

---

[4] An Article 32, in general terms is an investigative proceeding that is required under Article 32, Uniform Code of Military Justice before a General Court Martial is convened.

[5] The subpoena allegedly provided Fort Jackson was not made available by neither the Army or the Credit Union until sometime prior to the release of the Ninth Circuit decision in *Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002).

under...judicial subpoenas (para 2-5)).[6] Emphasis added Pet. App. 151a.

3. On June 25, 1998 out side the hearing, Capt. Randy Bagwell reviewed the financial records, female civilians entered the hearing after which Capt. Bagwell followed.[7] The Flowers became aware the Army had illegally obtained their financial records in November 1998. Then SGM Flowers was subject to harassment, intimidation, and forced to accept non-judicial punishment (Article 15).[8]

4. After Maj. General Hill, Commander 25th ID became aware of the process, charges for alleged violations of Article 121 (Larceny) and Article 81 (Conspiracy) were re-preferred on November 9, 1998. Capt. Kimberly Hunta was appointed Article 32 Investigating Officer and the hearing held on March 18-19, 1999. Capt. Hunta determined that charges were unsupported and recommended against court martial. The charges were dismissed on June 28, 1999. Maj.

---

[6] AR 190-6, para 2-5, echoes the definition of a judicial subpoena but acknowledges that a subpoena issued pursuant to the Manual for Courts-Martial, para 115, and the Uniform Code of Military Justice, art. 46, would qualify as a judicial subpoena for purposes of the Right to Financial Act. The regulation advises that if a judicial subpoena is issued under the act and AR 190-6, para 2-5, the notice and challenge provision of 12 U.S.C.§§ must be followed. See DA Pam 27-50-131.

[7] Capt. Randy Bagwell was a military lawyer and collegue of Capt. Ohlweiler while both were assigned to the Trial Counsel Office, 25th Infantry Division (L).

[8] Military punishment administered pursuant to 10 U.S.C.§ 815 by a superior officer upon waiver of one's right to a formal court-martial.

Ohlweiler retaliated through using the position of his office to bar SGM Flowers from reenlistment.[9] SGM Flowers, fourteen months short of completing thirty-years involuntarily retired on February 1, 2000.

B. *Flowers v. First Hawaiian Bank* Proceeding Below and Remand of the Ninth Circuit Court

1. Initially, the Flowers alleged the bank provided copies of their financial records to the Army absent obtaining a certificate of compliance and sued the bank on May 7, 1999. In March 2000, the district Court dismissed that suit holding that the bank did not violate the RFPA because its conduct was in response to Army's Article 32 subpoena and within the RFPA exemptions for information disclosed in the course of litigation between the government and a private citizen. *See* 12 U.S.C. § 3413(e) *see also Flowers v. First Hawaiian Bank*, 85 F. Supp. 2d 993. The Flowers appealed but pending the court's decision sued the Army and Credit union for violation of the RFPA. *See* RFPA § 3417(a), *see also* 32 CFR § 504.2 (k) (3) and AR 190-6, para 2-12 (15 January 1982) Pet. App. 132a and Pet. App. 159a-160a. The credit union in partial discovery allegedly mailed financial records to the Army absent the required certificate of compliance. 12 U.S.C. § 3403(b).

2. The Ninth Circuit remanded *Flowers I* on July 2, 2002. The court held that the subpoena issued for the Article 32

---

[9] Army Regulation ("AR") 601-280, Chapter, 8(b) provides that "[t]he bar to reenlistment is not a punitive action but is design for used as a rehabilitative tool. As justification for its actions, the Army delivered its Army's Annual Report (2002) to Congress that deliberately provided the U.S. Congress incorrect facts that "SGM Flowers' retired in lieu of Court martial." See AR 601-280.

hearing was invalid and grand jury exception under §§ 3413(e) and 3413(i) did not apply, and that the "bank produced the records at it own peril" when it failed to obtain a certificate of compliance. *see* § 3403(b); *Flowers v. First Hawaiian Bank*, 295 F.3d at 970-77(9th Cir. 2002). Thereafter, the Flowers amended the complaint and added the Army as a defendant. Both *Flowers I* (No: 99-00335 SPK) and *Flowers v. Department of the Army, et. al.*(Civil 01-00412 SPK) were consolidated on November 22, 2002.

3. In March 2000 the district court informed Mr. Flowers a special rule existed to speak on his wife while in Australia. The court later recanted and the Flowers hired attorney Charles R. Brown ("Mr. Brown") to represent them on February 6, 2003. At which defendants United States, Secretary of the Army Thomas White and Maj. John Ohlweiler were added to a Second Amended complaint filed on March 27,2003. When the Flowers questioned Mr. Brown's tactics, adding the United States, discovery and payments exceeding $10,000.00 a month, he motioned to withdraw. The court granted motion on August 7, 2003.[10]

C. The District and Appellate Court Decision in the Instant Appeal

On September 18 and 24, 2003 the government filed motions to dismiss the Second Amended Consolidated Complaint for lack of subject matter jurisdiction. It argued damages against the Army is barred by *Feres* citing e.g.,

---

[10] Petitioners filed a complaint with the Office of Disciplinary Counsel, State of Hawaii and the attorney was suspended in March 2006 for failing to cooperate with the Office of Disciplinary Counsel in their investigation.

Hodge v. Dalton, 107 F.3d 705, 710 (9th Cir. 1997)("The Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or in the course of activity incident to service.")(quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)(emphasis in original). The Flowers disagreed arguing the district court's jurisdiction under 12 U.S.C. § 3416. Pet. App. 111a. The court rejected that argument concluding that *Feres* requires the Court to dismiss [petitioners' RFPA] complaint against the government. *Id.*

1. The government argued that "[r]uling in favor of the government here does not mean military personnel have no right to financial privacy. The question is whether they should have a right to sue for damages if the violations occurred "incident to service." A finding against Marshall Flowers does not bar a member of the armed services from an action for violations of the RFPA if the disclosures occurred in other circumstances... "even if the RFPA 'protects' Flowers, this does not necessarily mean he should be entitled to damages from the Army." Pet. App. 92a. *See Flowers*, 289 F.Supp.2d. at 1219.

2. On October 31, 2003 the court dismissed the Flowers' claims against the Army and federal defendants. The dismissal's order stated in relevant part that:

> Marshall K. Flowers cannot dispute that his (and his wife's) claims" arise out of or in the course of activity incident to service." *Id.* Assuming the truth of the operative complaint's allegations and considering the undisputed evidence in the record, Marshall K. Flowers was an active duty Sergeant Major in the Army when the financial disclosures took place. That is, he was on active duty when the alleged violations

of the RFPA occurred. The relevant disclosures of bank records occurred in the course of, and because of, a military Article 32 proceeding against him investigating charges of larceny at military exchanges. Marshall Flowers retired or resigned from the Army in lieu of facing a general martial. He filed this civil action after leaving the Army. However, even though he is no longer in the military, *Feres* still applies to the claims that arose while he was on active duty. See e.g., *Jackson v. Brigle*, 17 F.3d 280, 281 (9th Cir. 1994) (barring action brought by former Air Force Officer) Pet. App. 84a.

3. The court reasoned that the "entire RFPA claim is based upon a subpoena or subpoenas issued to two financial institutions during an Article 32 proceeding investigating charges against him of 42 counts of larceny...and given the Ninth Circuit's decision that no exemption applies, essentially the only question now remaining on remand is one of damages for "willful or intentional" violations. 12 U.S.C. § 3417(a)[.] Pet. App. 88a. And "in order to access possible damages (which could not have been anything related to Marshall Flowers' allegedly "forced" retirement, which was independent of the financial disclosures) the Court could be required to examined the nature of the disciplinary investigation, the need for an Article 32 proceeding, the motives and state of mind of the investigating authorities in issuing the subpoenas to First Hawaiian Bank and Fort Jackson FCU, and other particulars of the process."

4. Lastly, the court considered the Flowers' discovery motions but concluded that "involvement in military affairs and discipline is only exemplified by pending discovery matters, which include whether Marshall Flowers should be allowed to reopen a civil deposition of General James T. Hill,

a four-star General who is currently commander of the Southern Command during a time of military conflict in Afghanistan and Iraq. Pet. App. 89a.

The Flowers' claims against the Bank and Credit Union were dismissed on December 5, 2003. Pet. App. 59a. The court also dismissed the Flowers' Rule 56(f) motion to conduct discovery and complete deposition of a bank employee Pet. App. 61a. Further, the court awarded $100 statutory damages against the bank ruling that genuine issue of material facts did not exist. Pet. App.61a.

5. The U.S Court of Appeals for the Ninth Circuit's (9th Circuit) unpublished memorandum affirmed that "the [district court] conclusion is in accord with... case law, which "broadly construe[s]" *Feres* "to immunize the United States and members of the military from any suit which may intrude in military affairs, second guess[] military decisions, or impair[] military discipline."(quoting *Zaputil v. Cowgill*, 335 F.3d 885, 887 (9th Cir. 2003) Pet. App.4a. The 9th Circuit determined the district Court properly dismissed the Flowers' RFPA claims against federal defendants because those claims implicate the concerns that lie in the heart of the *Feres* doctrine.[11] (Quoting Feres, 340 U.S. at 146; see also *United States v. Johnson*, 481 U.S. 681, 691 (1987) ("[A] suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of military mission.") *Id.*

---

[11] Our determination that *Feres* forecloses subject-matter jurisdiction over the RFPA claims directed at the federal defendants renders moot the Flowers' challenge to the district court's denial of their request for additional discovery from Army officials.

6. The questions before this Court is whether the statutory law (RFPA and prevailing regulations) waive the Government's sovereign immunity to protects servicemembers and their families from Army violations of their financial privacy or whether the judicially created *Feres* Doctrine as applied to the RFPA prevails over the authority of congress.

REASONS FOR GRANTING THE PETITION

I. THE JUDICIAL IMPORT OF *FERES V. UNITED STATES*, 340 U.S. 135 CANNOT BAR THE FLOWERS' CLAIM UNDER THE RIGHT TO FINANCIAL PRIVACY ACT, § 3416.

This case raises questions of critical importance particularly viewing the district court crafting of *Feres* to reach beyond its original intent. The court's application of judicially created *Feres* disregards RFPA statutory language of Congress and exceeds the court's authority. *Feres*, if allowed to stand deprives member(s) of the Nation Armed Forces and their families and dependants financial privacy afforded all Americans. This decision impacts profoundly on the soldiers' abilities to protect their financial privacy from Army abuses extending *Feres* as a shield that expressly ignores congressional intent. Thus, respectfully, the court's decision is not only tragically flawed but undermines legislative authority to regulate the Nations Armed Forces and constraints placed upon the Army. As the Honorable Supreme Court Justice Brennan expressed in *United States Et. Al. v. Stanley*, "the [court] disregards the command of our Constitution, and bows instead to the purported requirement of a different master, military discipline...[.] *See United States v. Stanley*, 483 U.S.669, 686 (1986). As in this case but less injurious than *Stanley*, the Army deliberately defied law, used and demonstrated unaccountability through *Feres*. The Court

should grant review because this decision is judicially wrong, inconsistent with the 9th Circuit's reasoning in *Flowers*, 295 F.3d 966, the Court of Appeals for the Armed Forces and similar cases in other district courts and courts of appeal (4th Circuit, 5th Circuit, 10th Circuit, and D.C. Circuit) and the law.

Consistently, this Court has articulated that a court may only exercise jurisdiction over the Government pursuant to "a clear statement from the United States waiving sovereign immunity . . . together with a claim falling within the terms of the waiver." *United States* v. *White Mountain Apache Tribe,* 537 U.S.465, 472 (2003). "[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187,192 (1996).

A. The Right to Financial Privacy Act, 12 U.S.C, § 3401 et. seq.

1. In 1978 Congress passed the Right to financial privacy Act in response to the U.S. Supreme Court decision in *United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed. 2d 71 (1976) *See* H.R. Rep. No. 1383, 95th Cong., 2d Sess. 34 (1978), which held that a bank customer had no Fourth Amendment expectation of privacy in records of his or her personal bank account. The operative section being that "no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution" unless the customer consents (§ 3404) or the government pursues one of the following four procedural options; an administrative subpoena (§ 3405), a search warrant (§ 3406), a judicial subpoena (§ 3407), or a formal written request (§ 3408).12 U.S.C. § 3402. Pet App. 100a. If the government seeks to invoke

one of the options, other than a search warrant, the RFPA contains specific procedures to protect the individual privacy interest. The RFPA defines "Government Authority" broadly as "any agency or department of the United States, or any officer, employee, or agent thereof." 12 U.S.C.§ 3401(3) (1988). The bank customers may challenge a ...subpoena in the "appropriate United States District Court." 12 U.S.C. § 3410(a). Each customer listed on the account must be notified that the government has requested access to his or her records. *See* 12 U.S.C. §§ 3405(2), 3407(2), 3408(4). The " government cannot gain access to a bank customer's financial record or other information without first complying with the notice requirement of the RFPA." *See Adams v. Board of Governors of the Federal Reserve Bd.*, 659 F.Supp. 948, 954 (D. Minn. 1987) *see also Donovan v. National Bank of Alaska*, 696 F.2d 678, 983 (9th Cir.1983).

2. Congress intended the RFPA to "strike a balance between customers' right of privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations." H.Rep. No. 1383, 95th Cong., 2d Sess. 33, reprinted in 1978 U.S. Code Cong. & Admin. News 9305, *See also United States v. Frazin*, 780 F.2d 1461, 1465 (9th Cir. 1986).

3. The RFPA's civil penalties provision provides that wrongful disclosure of financial records may result in liability for "such punitive damages as the court may allow where the violation is found to have been willful or intentional." 12 U.S.C. § 3417(a)(3) (1989); contra *Waye v. First Citizens National Bank*, 846 F.Supp. 310, 316-17 (M.D. Pa. 1994). Both the financial institution and governmental authority may be held liable for "obtaining or disclosing financial records of information obtained therein in violation of [the RFPA]. 12 U.S.C. 3417(a). "The remedies and sanctions described...

shall be the only authorized judicial remedies and sanctions for violations of this chapter." The customer may recover:

> 1) $100 without regard to the volume of records involved;
> 2) any actual damages sustained by the customer as a result of the disclosure
> 3) such punitive damages as the Court may allow, where the violation is found to have been willful or intentional; and
> 4) in the case of any successful action to enforce liability under this section, the costs of the action and reasonable attorney fees.

See 12 § U.S.C. 3417(a). Pet. App. 111a.

The statue provides that "an action to enforce any provision of this chapter may be brought in any appropriate United States district court without regard to the amount in controversy within three years from the date on which the violation occurs or the date of discovery of such violation." *See* § 3416; *see also* § 3417(d). *Id.*

The RFPA set forth a variety of exceptions for other government activities, *see* 12 USC § 3413, but provides no exemption for the Department of Defense in general or for military disciplinary matters in particular. Cf. e.g. 5 USC § 551(1)(F) (exclusion of courts-martial from coverage under the generally applicable provisions of the Administrative Procedures Act.) *United States v. Dowty*, 48 M.J. at 108, *see* 32 C.F.R. § 504.2 (k), *see also* AR 190-6, para 2-11.

B. The RFPA and Its Application to National Defense-Title 32 Code of Federal Regulation ("CFR") Parts 275 and 504 (1998)-Obtaining Information From Financial Institutions

1. Title 32 Code of Federal Regulation (C.F.R.) § 275 (1998) implemented the RFPA and prescribes procedures for Department of Defense to use to gain access to financial records maintained by financial institutions. *See* § 275.1. *see also* § 275.2 (a). (obligating provisions of this part to apply the Office of the Secretary of Defense and military departments, the Defense investigative Service, etc.) Pet. App. 114a.

2. Title 32 C.F.R. § 504.1 provides Department of the Army (DA) policies, and restrictions governing access to and disclosure of financial records maintained by financial institutions during the conduct of Army investigations. *See* § 504.1(a). Army investigative elements may not have access to or obtain copies of the information in the financial records of any customer from a financial institution unless the financial records are reasonable described and ...financial records are disclosed in response to a judicial subpoena which meets the requirements of § 504.2(e) (Judicial subpoenas (Includes subpoenas issued under Para 115 of the Manual for Courts- Martial and Article 46 of the Uniform Code of Military Justice...the notice and challenge provision of 12 U.S.C.3407 and 3410 will be followed). (emphasis added). *See* § 504.1(d)(2)

Section 504.2 (k) states "[a] certificate of compliance with the Right to Financial Privacy of 1978 (app. C) will be provided the financial institution as a perquisite to obtaining access to financial records under the following access procedures: (3) Judicial subpoena (§ 504.2(e)); and 504.2(l)-

Penalties states that "[o]btaining or disclosing financial records or financial information on a customer from a financial institution in violation of the act or this regulation may subject the Army to civil penalties, actual damages, as the court may allow, and cost with reasonable attorney fees. Military and civilian personnel who willfully or intentionally violate the act or this regulation may be subject to disciplinary actions). Pet. App. 132a-133a.

Also, the Department of Defense (DoD) published DOD Directive (DODD 5400.12, Obtaining Information from Financial Institutions, 6 February 1980; Change 1 to DODD 5400.12, 23 April 1981 that implemented Title 12, United States Code, Public Law 95-630, Right to Financial Privacy Act of 1978. It sets forth policy for Department of the Army to obtain information on a customer's financial records from a financial institution. Further supplemented Army Regulation (AR) 190-6 (15 January 1982), Obtaining Information from Financial Institutions prescribing procedures to obtain financial information. Pet. App. 142a-161a.

C. The Federal Tort Claims Act ("FTCA")

1. The Federal Tort Claims Act (FTCA, August 2, 1946, ch. 753, title IV, 60 Stat. 842, 28 U.S.C. § 1346(b) and 28 U.S.C. §§ 2671-2680), is a statute enacted by the United States Congress in 1946 permitting private parties to sue the United States in a federal court for most torts committed by persons acting on behalf of the United States. Liability under the FTCA is limited to "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 2674. Congress vested the federal district court with exclusive jurisdiction to hear such tort claims, *ibid.*, and provided that the United States shall be

liable "in the same manner and to the same extent as a private individual under like circumstances.." 28 U.S.C. § 2674. The FTCA contains several exceptions to this limited waiver of sovereign immunity. *See* 28 U.S.C. § 2680(a)-(n); 28U.S.C. 1346(b)(1) (incorporating "the provisions of Chapter 171," i.e.28 U.S.C. § 2671 et seq.)"It is well settled that the United States enjoys sovereign immunity from suits and accordingly, may be sued only if it has waived that immunity." *United States v. Idaho ex rel. Dep't of Water Resources*, 113 S. Ct. 1893, 1896, (1993). Only the United States may be sued under the FTCA and before an action may be filed under the FTCA, an administrative claim to the appropriate agency is a jurisdictional requirement predicated upon 28 U.S.C. § 1346(b). Additionally, an administrative claim must be presented to the federal agency employing the person whose act or omission caused the injury. *McNiel v. United States*, 508 U.S. 106, 113 S.Ct. 1980 (1993); *Meridian Intern. Logistics, Inc. v. United States*, 939 F.2d 740 (9th Cir. 1991) 28 U.S.C. § 2675.

D. The *Feres* Doctrine (*Feres v. United States*, 340 U.S. 135 (1950)).

1. Shortly after enactment of the FTCA, *Brooks v. United States*, 337 U.S. 49 (1949) was decided. Two servicemen and their father were driving on a public road when an Army truck struck them. The government moved to dismiss for lack of jurisdiction, arguing that because the brothers were in the Army, claims arising from their injuries and death were excepted from the FTCA. The Court rejected the argument. "The statue terms are clear. They provide for District Court jurisdiction over any claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen." *Id.* at 51 (emphasis in original). The accident explained the Court, "had

nothing to do with the [brothers] Army careers...except in a small sense that all human events depend on what already transpired. *Id.* Almost a year after Brooks, the Court decided *Feres v. United States*, 340 U.S. 135 (1950). Two of the three consolidated cases involved claims of medical malpractice; the third was a wrongful death claim arising out of a soldier's death in a barracks fire. Deciding that none of the claims should have been permitted to go forward, the *Feres* Court held that in addition to the exceptions specified by Congress in the FTCA, Congress intended to exempt all tort claims "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146.

2. Over thirty-five years later, in *Chappel v. Wallace*, 462 U.S. 296 (1983), the Supreme Court extended this "*Feres* doctrine" to bar military personnel from bringing *Bivens* actions to recover damages for constitutional torts committed by superior officers. *See id.* at 304. See generally *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)(authorizing damages actions against federal officials who engage in unconstitutional conduct). In *United States v. Johnson*, 481 U.S. 681 (1987), four dissenting Justices criticized *Feres* as "wrongly decided and heartily deserv[ing] the widespread, almost universal criticism it has received. *Id.* at 701(Scalia, J., joined by Brennan, Marshall, and Stevens, JJ.) (internal quotation marks omitted).

Quite the contrary, the FTCA and Feres are inapplicable to the RFPA and its requirements.

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE §§ 3416, 3417(a) AND 32 C.F.R.§ 504.2 (1998) WAIVES THE GOVERNMENT SOVEREIGN IMMUNITY AND PROVIDE FOR PENALTIES FOR WILLFUL AND INTENTIONAL VIOLATIONS OF THE ACT.

This Court should grant review since Congress unambiguously expressed its intent through Title 12 U.S.C. § 3416 that grants jurisdiction to the Federal Courts to hear any action to enforce a provision of the bill [RFPA], providing a three years statue of limitations for actions brought under it. Also, expressed clearly under 32 CFR Part 504.2 (l) that states:

> Obtaining or disclosing financial records or financial information on a customer from a financial institution in violation of the act or this regulation may subject the Army to payment of civil penalties, actual damages, punitive damages as the court may allow, and cost with reasonable attorney fees. Military and civilian personnel who willfully or intentionally violate the act or this regulation may be subject to disciplinary action.

See § 504.2(l). Pet. App. 133a. *see also* AR 190-6, para 2-12 (15 January 1982). Pet. App.159a-160a.

Where the language of a statue or regulation is plain and unambiguous, and the literal application of the language would not produce an absurd or unjust result, and the language is clearly consistent with the purposes and policy of the statue or regulation, the circuit court reconstruction of the RFPA is inappropriate.

III. THE NINTH CIRCUIT'S TEST FOR DETERMINING WHAT CONSTITUTES "ACTIVITY INCIDENT TO SERVICE" AND ITS HOLDING THAT *FERES* BARS PETITIONERS RFPA CLAIMS CONFLICTS WITH DECISIONS OF OTHER COURTS CIRCUITS.

1. The decision of the 9th Circuit Court conflicts with other courts' interpretation that the RFPA unequivocally waives government sovereign immunity. The appeals court expansion of *Feres* to the RFPA allows an unaccountable Government authority to use back door tactics to access financial record. A tactic clearly inconsistent with the civil penalty provision.

2. In the U.S. Court of Appeals for the Armed Forces (C.A.A.F.) the court addressed how comprehensive statues of general application become incorporated into the military justice system. In *United States v. Dowty*, the C.A.A.F analyzed the RFPA, 12 U.S.C. §§ 3401-3422 stating that:

> Under the Constitution, "Congress has plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline." Quoting *Weiss v. United States*, 510 U.S. 163, 177, 114 S.Ct. 752, 760, 127 L. Ed. 2d 1 (1994); *see* U.S. Const., Art. I, § 8, cl. 14. While members of the armed forces are not excluded from the protections of the Constitution, "the different character of the military community and the military mission requires a different application of those protections" quoting *Parker v. Levy*, 417 S.Ct. 2547, 2563, 41 L.Ed. 2d 439 (1974). While members of the armed forces do not enjoy the full panoply of constitutional and statutory rights available to others, they are no less citizens of the United States. In

> absence of a valid military purpose requiring a different result, generally applicable statues normally are available to protect servicemembers in their personal affairs. Cf. para. 14c(2)(a)(iii), Part IV, Manual for Courts-Martial, United States (1995).

See United States v. Dowty, 48 M.J.102, 107 (1998).

The C.A.A.F. recognized the Uniform Code of Military Justice as a special, well integrated statue and exercised caution in overlaying a generally applicable statue specifically onto the military system. But the court noted "[u]nder the circumstances...we note the unambiguous language in RFPA; the circumstances of the legislative history; the contemporaneous implementation of the RFPA by the Department of Defense and military departments; and judicial application of the RFPA generally to servicemembers. We decline now to deprive personnel of these important privacy rights...[.]" *Id.* at 111.

3. In its final analysis, the Court concluded that "the Department of Defense has not attempted to exclude military personnel from protections of the Act and that ' following enactment of the legislation, DoD issued a regulation that "implements" the RFPA. Department of Defense Directive 5400.12, "Obtaining Information from Financial Institutions," § A (Feb 6, 1980). *Id.* "As a matter of law...the RFPA has covered applicable financial records of members of the armed forces since it was enacted in 1978. *Dowty*, 48 M.J. at 109. The C.A.A.F determined that DoD did not attempted to exclude military personnel from [RFPA] protections but following enactment of the legislation, DoD issued a regulation that "implements" the RFPA; Department of Defense Directive 5400.12, "Obtaining Information from Financial Institutions," § A (Feb 6, 1980). *Id.* at 107.

4. Other courts have similarly recognized compulsory procedures for Army compliance with the RFPA. In *Duncan v. Belcher*, 813 F.2d 1335 (4th Circuit) LTC Duncan and spouse sued the Department of the Army for violation of their Rights to Financial Privacy, 12 U.S.C.§§ 3401 et. seq., when the Army examined their American Express card without their consent. Their suit asked for statutory, compensatory and punitive damages. *Id.* at 1337. At the close of Duncans' evidence, the district court, sitting without a jury, granted defendant's dismissal. The Duncans appealed. The Army's argued that application of the Act [RFPA] in cases such as this will interfere with military discipline and law enforcement in general. But the appealed court acknowledged, that, "[t]he most salient feature of the Act is the narrow scope of the entitlement it creates." *Securities and Exchange Commissioner v. Jerry T. O'Brien, Inc.*, 467 U.S.735, 745, 104 S.Ct.2720, 2726, 81 L.Ed 2d 615 (1984). *Id.* at 1339 and decline to accept the Army's argument, holding that "[t]he act's provision hardly insulate private accounts from investigation by government agencies...the Act merely establishes summary procedures for government investigators to follow." *Id.* The court concluded, "If the government is found liable under the Act, plaintiffs are entitled to $100 statutory damages regardless of whether they prove actual damages.12 U.S.C.§ 3417(a)." *Id.* at 1339. "The district court finding of no liability was therefore in error." *Id.*

Quite clearly § 3416 vest jurisdiction in "any U.S. District Court." *See* 12 U.S.C. § 3416. *See also McDonough v. Windall*, 891 F. Supp. 1439, 1448-1449 (D. Colo.1995) (Jurisdiction over RFPA matters is vested exclusively in Article III courts." § 3416 [and] [t]he RFPA provides the "sole judicial remedies and sanctions for violation of this chapter." 12 U.S.C. § 3417(d)); the question whether and what McDonough may recover under the provisions of

§ 3417(a) remains for another day."); *United States v. Wooten*, M.J. 141 (CMA 1992)(alleged violations of the RFPA are within the jurisdiction of Article III Courts and not the military justice system." *Id.* citing 12 U.S.C.§ 3416.); *Anderson v. La Junta State Bank*, 115F.3d 756 (10th Cir. 1997) (If the government or a financial institution violates the RFPA, the customer whose financial records were disclosed is entitled to $100, regardless of the volume of records involved. *Id.* § 3417(a); *Taylor v. Department of the Air Force*, 18 F. Supp. 2d. 1184, 1188 (The civil penalties provides that disclosure of financial records in violation of the RFPA may result in liability for "such punitive damages as the Court may allow, where the violation is found to have been willful or intentional." 12 U.S.C.§ 3417(a)(3)).

5. As is Flowers *Cummings v. Department of the Navy*, 279 F.3d 1051 (D.C. 2002) was a case of first impression. Cummings sued the Navy in the U.S. District Court for the District of Columbia alleging that the Navy released a copy of a report to an author evaluating her flying abilities and potential in violation of the Privacy Act. The Navy moved to dismiss Cummings' claim based upon *Feres* and the district court dismissed holding that the Navy's release of Cummings Evaluation Report "was incident to service." *Id.* at 1053. Cummings appealed. The question before the U.S Court of Appeals, District of Columbia Circuit (D.C. Cir.) was whether members of the Armed Forces may sue the military for damages under the privacy act. By analyzing the statue, the court started with 'cardinal' cannon of statutory construction: "Courts must presume that [the Congress] says in a statue what it means and means in a statue what it says." Quoting *Comm. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 117 L.Ed2d. 391 (1992) (citation omitted)."When the words of a statue are unambiguous, then, this first cannon is also last: Judicial inquiry is complete.'" *Id.*

at 254, 112 S.Ct.1146, 1149 (Quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981). After the court's analysis as to whom application of the act applied to "military departments" and certain provisions of the act that manifested congressional intent to protect uniform personnel like Cummings, the appeals Court concluded that "Congress unambiguously intended to establish a duty that runs from a "military department" (like the Navy) to military personnel (like Cummings) not to "disclose any record which is contained in its system of records" (like Cummings evaluation reports. *Id.* at 1054. The Act ...demonstrates that the Congress did not intend the Courts to craft additional exemptions from coverage based upon the type of relief a service-woman request (i.e., by limiting suits to equitable relief only) quoting *Fawn Mining Corp v. Hudson*, 80 F.3d 519, 523 (D.C. Cir. 1996) ("Neither lawyers nor judges serves as back-seat lawmakers who may extend statues beyond their bounds or change the rules that Congress has set.") *Id.* "Waivers of sovereign immunity must be unequivocally expressed and narrowly construed." *Cummings*, 116 F.Supp. 2d at 81 (Quoting *Dorsey v. Dep't of Labor*, 41 F.3d 1551, 1555 (D.C. Cir. 1994).

6. Quite frankly, the court has extended *Feres* beyond its bounds, changed RFPA rules implemented for "military departments" under Title 32 C.F.R. § 275.1. *See* 32 C.F.R. § 275.2(a). Pet. App. 114a. *See also* 32 C.F.R. § 504.1(b)(This regulation applies to all DA investigative activities conducted by the active Army. Pet. App. 118a.) The Government in its motion to dismiss argues:

> Ruling in favor of the government here does not mean military personnel have no right to financial privacy. The question is whether they should have a right to sue for damages for violations if the violations

> occurred "incident to service. A finding against Marshall Flowers does not bar an action for violation of the RFPA if the disclosure occurred in other circumstances. It also would not bar claims for damages against financial institutions such as FHB and FJFCU. Pet. App. 91a-92a.

8. Respectfully, this argument lacks merit and ignores "statues and [regulations] say what they mean and mean what they say." Thus, it imports judicially created Feres to deny rights protected by the act. The answer to the Government question "whether... [the Flowers] should have a right to sue for damages for [RFPA] violations" is answered by the D.C. Cir. "Neither lawyers nor judges serves as back-seat lawmakers who may extend statues beyond their bounds or change the rules that Congress has set." quoting of *Fawn Mining Corp*, 80 F.3d at 523. *Cummings*, 279 F.3d at 1054 ("When the words of a statue are unambiguous, then, this first cannon is also last: Judicial inquiry is complete").

IV. THE DISTRICT COURT'S APPLICATION OF FERES DENIED DISCOVERY AND IMPROPERLY GRANTED SUMMARY JUDGMENT TO THE FINANCIAL INSTITUTIONS

This Court should grant review since the court's import of *Feres* prohibited the Flowers from obtaining discovery of federal witnesses to adequately respond to the financial institutions motions for summary judgment. Pet. App.96a-97a. The Government's argument that discovery for the Flowers would require the court to interfere with "military discipline," contradicted the government use of federal defendants' depositions (minus cross-examination) that provided financial institutions with unchallenged prejudicial evidence which substantially violated procedural due process.

1. Discovery is integral to litigate RFPA claims for damages whereas the court restricted discovery and the Flowers' Rule 56(f) motion. This denial significantly prejudice and impacted upon Flowers' ability to litigate damages. The 9th Cir. decision in *Flowers I* states uncategorically the First Hawaiian Bank ("bank) violated the act but the district court unreasonably restricted access to discovery that prohibited depositions of federal defendant and witnesses, particularly, Capt. John Ohlweiler and former 25th Infantry Division Commander, General James Hill. This absence of equal access to discovery violated due process and restricted their claims for compensatory and punitive damages.

A. Standard for Summary Judgment

(1) Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509, 91 L.Ed.2d 202 (1986).

(2) The jurisdiction of the lower court was pursuant to 12 USC § 3416. The government's 12 (b) motion and district court consideration of Feres should have been converted into summary judgment since a Rule 12(b)(1) motion does not consider matters outside the pleading, the motion can only test legal issues and not matters of fact. *See Rivera City of LA*, 159 F.3d 470,477 (9th Cir. 1998); Fed. R. Civ. P. 12 (b). Given the fact, the Flowers should have been given reasonable

opportunity to present all material made pertinent to such a motion.

(3) As a general rule, the Court "may not consider any material beyond the pleadings in ruling on a Rule 12 (b) motion. *Lee v.City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). Rule 12 (b) expressly provides that "when matters outside the pleading are presented to and not excluded by the court, the motion *shall* be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed.R.Civ.P. 12 (b) (6) (emphasis added).

2. Even arguendo *Feres* precluded a servicemembers RFPA claims against the Army and not the financial institutions, the imposition of *Feres* in any case present prejudicial barriers to soldiers' ability to litigate against financial institutions. As in this case *Feres* shields the Army and financial institutions from liability by restricting the Flowers' ability to questioning and cross examination of federal defendants.

Title 32 C.F.R. § 504 protects soldiers and their families' financial privacy and the Army violation presented the Flowers with a cause of action in the U.S. District Court. *See* 12 U.S.C. § 3416. The financial institutions were required to obtain a certificate of compliance from the Army before release of the financial records.12 U.S.C. § 3403(b). *see also* § 504.2(k) (A certificate of compliance... will be provided to the financial institution as a prerequisite to obtaining access to financial records under...Judicial subpoenas(§ 504.2(e)) (emphasis added). Neither financial institutions obtained the required certificate of compliance but responded to oral communication and provided the Flowers financial record.

4. In Petitioner's appeal to the Ninth Circuit, questions relative to "due process' regarding discovery (Rule 56f) were before the panel but dismissed as questions without merit. As means of denying the Flowers discovery, the government argued that the district court involvement in military affairs and discipline is only exemplified by the pending discovery matters, which include whether Marshall Flowers should be allowed to reopen a civil deposition of General James Hill, a four star General... during a time of military conflict in Afghanistan and Iraq. In support the district court concludes:

> His (General Hill) testimony to date includes reasons for the Article 32, the Subsequent recommendation for seeking a general court-martial against Flowers, and some of the reasons for the agreement between Flowers and the Army to accept non-judicial punishment (an Article 15)and to seek immediate retirement in lieu of the Army's proceeding with a General Court-martial. In short *Feres* appears applicable here where all indications are that Marshall K. Flowers is entitled to, at most, $100 statutory damages.

Flowers, 289 F. Supp. at 1219

5. Rule 56(f) of Federal Rules of Civil Procedure gives trial court judges discretion to allow discovery prior to the grant of summary judgment where "it appear(s) from the affidavit of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition. We believe the district judge abuses his discretion by denying the Flowers' Rule 56(f) motion and granting the financial institutions summary judgment.

6. The district court first dismissed the plaintiffs' claims against Fort Jackson under the RFPA pursuant to 12 U.S.C. § 3413(e), which provides that "[n]othing in this chapter shall apply when financial records are sought by a Government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules in other courts in connection with litigation to which the Government authority and the customer are parties."

7. On appeal, Petitioners argued that the exception in § 3413 does not apply, and that their complaint is facially valid because it alleges that the government did not satisfy the requirements of 12 U.S.C. § 3402 or " rules of comparable Court" (Manual for Court Martial, Code of Federal Regulation, part 504.1 (1998) or AR 190-6 (1995)). The exception in § 3413(e) states that the requirements of the chapter will not apply when the financial records sought by the government are pursued "in connection with litigation to which the Government authority and the customer are parties."

The Flowers were not parties to any litigation with the government, the credit union failed to obtain a certificate of compliance and summary judgments and cost to the Credit Union was therefore in error. *See* § 504.2(K)(3).

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be granted and the judgment should be reversed.

Respectfully submitted,

Marshall K. Flowers
P.O. Box 29632
Honolulu, Hawaii 96820
(808) 256-2279

Anna Flowers
50 Albert Street
Goodwood 5034
Adelaide, South Australia
61 88 358-5890

Petitioners Pro Se